



Billing Code 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 190215127-9273-01]

RIN 0648-BI73

Fisheries Off West Coast States; Coastal Pelagic Species Fisheries; Multi-Year Harvest Specifications for the Central Subpopulation of Northern Anchovy

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule.

SUMMARY: NMFS issues this proposed rule to revise the annual reference points, including the overfishing limit (OFL), acceptable biological catch (ABC) and annual catch limit (ACL), for the central subpopulation of northern anchovy in the U.S. exclusive economic zone off the Pacific coast under the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP). NMFS prepared this rulemaking in response to a January 2018 court decision (*Oceana, Inc. v. Ross*) that vacated the OFL, ABC, and ACL for the central subpopulation of northern anchovy, followed by subsequent orders requiring NMFS to establish a new OFL, ABC, and ACL through notice and comment rulemaking. NMFS is proposing an OFL of 94,290 metric tons (mt), an ABC of 23,573 mt, and an ACL of 23,573 mt. If the ACL for this stock is reached or projected to be reached, then fishing will be closed until it reopens at the start of the next fishing season.

This rule is intended to conserve and manage the central subpopulation of northern anchovy off the U.S. West Coast.

DATES: Comments must be received by [*INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER*].

ADDRESSES: You may submit comments on this document, identified by NOAA-NMFS-2019-0021 by any of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov#!/docketDetail;D=NOAA-NMFS-2019-0021, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Barry A. Thom, Regional Administrator, West Coast Region, NMFS, 501 W. Ocean Blvd., Ste. 420, Long Beach, CA 90802-4250; Attn: Joshua Lindsay.
- *Instructions:* Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (*e.g.*, name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Joshua Lindsay, West Coast Region, NMFS, (562) 980-4034.

SUPPLEMENTARY INFORMATION: The CPS fishery in the U.S. exclusive economic zone (EEZ) off the West Coast is managed under the CPS FMP. The Pacific Fishery Management Council (Council) developed the FMP pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801 *et seq.* The six species managed under the CPS FMP are Pacific sardine, Pacific mackerel, jack mackerel, northern anchovy (northern and central subpopulations), market squid, and krill. The CPS FMP is implemented by regulations at 50 CFR part 660, subpart I.

Management unit stocks in the CPS FMP are classified under three management categories: active, monitored, and prohibited harvest species. Stocks in the active category (Pacific sardine and Pacific mackerel) are managed under catch limits set using regular stock assessments and periodic or annual adjustments of target harvest levels based on those stock assessments. Fisheries for these stocks have biologically significant levels of catch, or biological or socioeconomic considerations requiring this type of relatively intense harvest management procedures. In contrast, stocks in the monitored category (jack mackerel, northern anchovy, and market squid¹), are managed under long-term catch limits and annual qualitative reviews of available abundance data without regular stock assessments or annual adjustments to target harvest levels. Fisheries for monitored stocks do not have biologically significant catch levels and, therefore, do not require intensive harvest management. As a result, monitored stocks have been

¹ Market squid is statutorily exempt from the general requirement to be managed using an ACL because of its short life-cycle.

adequately managed by tracking landings and examining available abundance indices. Species in both categories may be subject to management measures such as catch allocation, gear regulations, closed areas or closed seasons. For example, trip limits and a limited entry permit program apply to all CPS finfish. The prohibited harvest species category is comprised only of krill, which is subject to a complete prohibition on targeting and retention.

In September 2011, NMFS approved Amendment 13 to the CPS FMP, which modified the framework process used to set and adjust fishery specifications and for setting ACLs and accountability measures (AMs). Amendment 13 conformed the CPS FMP with the 2007 amendments to the Magnuson-Stevens Act and the Magnuson-Stevens Act National Standard 1 (NS1) guidelines at 50 CFR 600.310, which for the first time required ACLs be established for management unit species (with exceptions). Specifically, Amendment 13 maintained the existing reference points and the primary harvest control rules for the monitored stocks (jack mackerel, northern anchovy and market squid), including the large uncertainty buffer built into the ABC control rule for the finfish stocks. Amendment 13 established a management framework under which the OFL for each monitored stock is set equal to its existing maximum sustainable yield (MSY) value, if available, and ABC values are set at 25 percent of OFL, to provide a 75-percent scientific uncertainty buffer. ACLs are then set either equal to or lower than the ABC; annual catch targets (ACTs), if deemed necessary, can be set less than or equal to the ACL, primarily to account for potential management uncertainty.

Compared to the management framework for stocks in the active category, which uses annual estimates of biomass to calculate annual harvest levels, the ACLs for the

monitored finfish stocks are not based on annual estimates of biomass or any single estimate of biomass. As described above, ACLs for monitored finfish are set at the ABC levels, which are no higher than 25 percent of the OFL. OFLs are set equal to estimates of MSY—an estimate that is intended to reflect the largest average fishing mortality rate or yield that can be taken from a stock over the long term if contained in the CPS FMP or set based on a stock specific method if deemed more appropriate. Although the control rules and harvest policies for monitored CPS stocks are simpler than the active category control rules, the inclusion of a large non-discretionary buffer between the OFL and ABC both protects the stock from overfishing and allows for a relatively small sustainable harvest. In recognition of the low fishing effort and landings for these stocks, the Council chose this type of passive management framework for some finfish stocks in the FMP because it has proven sufficient to prevent overfishing while allowing for sustainable annual harvests, even when the year-to-year biomasses of these stocks fluctuate.

On January 18, 2018, in *Oceana v. Ross*, the U.S. District Court for the Northern District of California granted summary judgment to Oceana, vacating OFL, ABC, ACL for the central subpopulation of northern anchovy (hereafter, simply “central anchovy”). This ruling, as well as subsequent court rulings require NMFS to re-establish these reference points through a final rule no later than late May. Therefore, NMFS proposes to implement a new OFL, ABC and ACL that would be in effect beginning in the 2019 fishing year and that would remain in place until new scientific information becomes available to warrant changes.

To determine these new reference points, NMFS reviewed existing data sources, including historical estimates of biomass from the last stock assessment NMFS completed for central anchovy in 1995, as well as more recent NMFS estimates of relative abundance and analyses for determining a new long-term OFL for central anchovy, to use within the FMP's default ABC control rule for monitored stocks. We determined that an OFL and ABC that deviated from the management approach set in the FMP for stocks in the monitored category would be beyond the scope of this rulemaking.

After this review, NMFS determined that with the limited time to review and analyze complex approaches for setting these reference points, the most appropriate path at this time for setting an OFL for central anchovy in accordance with the FMP is to use an approach similar to the approach used by the Council, and approved by NMFS, for developing reference points for OFL and ABC for the northern subpopulation of northern anchovy (NSNA) in 2010. When the Council developed the OFL and ABC for NSNA a numerical MSY value was not available to set as the OFL. Therefore, instead of basing the OFL on an estimate of MSY, the OFL was calculated by multiplying the average of the only two available biomass estimates by the F_{MSY} (*i.e.*, fishing mortality at MSY) used for Pacific mackerel in the CPS FMP. Pacific mackerel was deemed an appropriate fishing mortality proxy because the life history characteristics of NSNA should allow it to support a fishing rate at least as high as Pacific mackerel while sustaining the population. The established uncertainty buffer of 75 percent was then applied to calculate the ABC for NSNA.

Consistent with the approach used to set the NSNA reference points, the proposed OFL, ABC, and ACL in this rule are based on averaging three of the available four recent

estimates of the relative abundance for central anchovy from NMFS surveys and an estimate of the rate of fishing mortality for central anchovy at MSY .² The abundance estimates are from the 2016 and 2018 NMFS acoustic-trawl method (ATM) surveys, which are 151,558 mt and 723,826 mt respectively and the 2017 NMFS daily egg production method (DEPM) survey, which is 308,173 mt. An ATM estimate was also available for 2017. However, NMFS evaluated the 2017 estimate compared to the other ATM estimates, and decided, for this rulemaking, to exclude it from the analysis to generate catch limits. The reason for this was that the ATM survey in the summer of 2017 was focused off the northern portion of the U.S. West Coast as well as the west coast of Vancouver Island, British Columbia, Canada, and was not designed to sample the complete range of central anchovy. The principle objectives of this survey were to gather data on the northern stock of Pacific sardine, and to some extent, the northern stock of northern anchovy, and therefore the survey chose not to sample south of Morro Bay, California, which is area where central anchovy are typically found.

The fishing mortality rate estimate is from analysis the SWFSC completed in 2016 as part of an effort examining minimum stock size thresholds for CPS. This analysis used the most current time-series data available for potentially deriving an F_{MSY} which comes from the last model-based stock assessment for central anchovy completed for formal management purposes (Jacobson et al. 1995). This analysis produced estimates of F_{MSY} based on eight alternative models. We have used the average of the four best fitting models from that work to calculate an E_{MSY} of 0.239. The methodology

² The calculation uses an E_{MSY} , which is the exploitation rate for deterministic equilibrium MSY .

results in a proposed OFL of 94,290 metric tons (mt), an ABC of 23,573 mt, and an ACL of 23,573 mt.

In determining whether to use the abundance estimates mentioned above, we considered the fact that scientific reviews presented to the Council at its April 2018 meeting stated that because the acoustic estimates cannot be considered absolute estimates of biomass, two things would need to occur before they are used to directly inform management, unless they are used as a data source in an integrated stock assessment model, including: addressing the area shoreward of the survey that is not sampled, and conducting a management strategy evaluation to determine the appropriate way to incorporate an index of abundance into a harvest control rule. However, because the acoustic estimates represent recent information on the stock and can be considered minimum estimates of the stock size, we are comfortable at this time that using these estimates in a time series to set an OFL will, in combination with reducing the OFL by 75 percent to set the ABC and ACL, prevent overfishing. Therefore, NMFS determined that using these ATM estimates in the manner described above, represent the best available information for determining the proposed reference points in this rule.

The Council developed, and NMFS approved, the monitored stock management control rules and overfishing specification process as consistent with the best scientific information available. Monitored stock management, including the buffer between the OFL and ABC built into the harvest policy for CPS stocks, appropriately accounts for the various types of scientific uncertainty around the OFL estimate. NMFS has determined that maintaining this approach for the proposed OFL and ABC in this action is sufficient to prevent overfishing for the central anchovy stock. We are proposing that the ACL be

set equal to the ABC. Setting a lower ACL or establishing an additional ACT to account for management uncertainty is unnecessary because managers have the ability to track the landings of this fishery and close the fishery if necessary to ensure the ACL is not exceeded.

The proposed ACL would sufficiently limit harvests of central anchovy on an annual basis and prevent overfishing, as each year the total harvest of the stock will be assessed against the ACL. These reference points would remain in place until changed according to the FMP framework. If the ACL is reached the fishery would be closed until the beginning of the next fishing season. The NMFS West Coast Regional Administrator would publish a notice in the **Federal Register** announcing the date of any such closure.

This action also proposes a minor revision to section § 660.509 to clarify the NMFS West Coast Regional Administrator's authority to close a CPS fishery by announcement in a notice published in the **Federal Register**, per the CPS FMP, when an ACL is reached. Currently this section describes the Regional Administrator's authority for implementing in-season closures only when a directed fishery allocation or incidental allocation is reached.

Classification

NMFS is issuing these proposed regulations under Magnuson-Stevens Act §305(d), 16 USC §1855(d).

Pursuant to the procedures established to implement section 6 of E.O. 12866, the Office of Management and Budget has determined that this proposed rule is not significant.

An initial regulatory flexibility analysis (IRFA) was prepared, as required by section 603 of the RFA (RFA). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the SUMMARY section of the preamble and is not repeated here. The results of the analysis are stated below. A copy of this analysis is available from NMFS (see **ADDRESSES**).

For Regulatory Flexibility Act (RFA) purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of \$11 million for all its affiliated operations worldwide.

The action being implemented through this proposed rule is the establishment of a new OFL, ABC, and ACL for the central anchovy.

The small entities that would be affected by the proposed action are the vessels that harvest central anchovy as part of the West Coast CPS purse seine fleet. The average annual per vessel revenue in 2016 for the West Coast CPS finfish small purse seine fleet, as well as the few vessels that target anchovy off of Oregon and Washington, was below \$11 million; therefore, all of these vessels are considered small businesses under the RFA. Because each affected vessel is a small business, this proposed rule is considered

to equally affect all of these small entities in the same manner. Therefore, this rule would not create disproportionate costs between small and large vessels/businesses.

To evaluate whether this proposed rule could potentially reduce the profitability of affected vessels, NMFS compared current and average recent historical landings to the proposed ACL (maximum fishing level for each year). The proposed ACL for central anchovy is 23,573 mt. In 2018, approximately 17,040 mt of central anchovy were landed. The annual average harvest from 2009 to 2018 for central anchovy was 7,020 mt. Central anchovy landings have been well below the proposed ACL in 8 of the past 10 years. Therefore, although the establishment of a new ACL for this stock is considered a new management measure for the fishery, and is lower than the previous ACL level of 25,000 mt, this proposed action should not result in changes in current fishery operations. As a result, it is unlikely that the ACL proposed in this rule will limit the potential profitability to the fleet from catching central anchovy and thus would not impose significant economic impacts.

The central anchovy fishery is a component of the CPS purse seine fishery off the U.S. West Coast, which generally fishes a complex of species that also includes the fisheries for Pacific sardine, Pacific mackerel, jack mackerel, and market squid. Currently there are 58 vessels permitted in the Federal CPS limited entry fishery off California. Annually, 32 of these 58 CPS vessels landed anchovy in recent years.

CPS finfish vessels typically harvest a number of other species, including Pacific sardine, Pacific mackerel, and market squid, making the central anchovy fishery only one component of a multi-species CPS fishery. Therefore, the revenue derived from this fishery is only part of determining the overall revenue for a majority of the vessels in the

CPS fleet, and the economic impact to the fleet from the proposed action cannot be viewed in isolation. CPS vessels typically rely on multiple species for profitability because abundance of the central anchovy stock, like the other CPS stocks, is highly associated with ocean conditions and seasonality. Variability in ocean conditions and season results in variability in the timing and location of CPS harvest throughout the year. Because each species responds to ocean conditions in its own way, not all CPS stocks are likely to be abundant at the same time. Therefore, as abundance levels and markets fluctuate, the CPS fishery as a whole has relied on a group of species for its annual revenues.

NMFS reviewed and evaluated other methods and data sources to update the estimate of MSY or develop a new long-term OFL. However, NMFS had limited time to fully review these types of methods; therefore, an alternative such as this was not fully developed. The CPS FMP also states that the ACL is set equal to the ABC or lower if determined necessary to prevent overfishing or for other optimum yield considerations not already build into the ABC control rule. The proposed action sets the ACL equal to the ABC which is the maximum level it can be set; other alternatives for the ACL could only set it lower, creating a higher potential for negative economic impact on the directly affected fishermen. Additionally, the proposed action maintains the management approach set in the FMP for stocks in the monitored category, which dictates how the OFL and ABC can be set, thereby limiting the alternatives for these values.

Thus, no significant alternatives to this proposed rule exist that would accomplish the stated objectives of the applicable statutes while minimizing any significant economic impact of this proposed rule on the affected small entities. However, as stated above, this

proposed rule is not expected to have a significant economic impact on the regulated fishermen.

This action does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 2, 2019.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 660 is proposed to be amended as follows:

PART 660--FISHERIES OFF WEST COAST STATES

1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*, 16 U.S.C. 773 *et seq.*, and 16 U.S.C. 7001 *et seq.*

2. In § 660.509, paragraph (a) is revised to read as follows:

§ 660.509 Accountability measures (season closures).

(a) *General rule.* When the directed fishery allocation, incidental allocation, annual catch limit is reached for any CPS species, the fishery for that CPS species will be closed until the beginning of the next fishing period or season. The Regional Administrator shall announce in the FEDERAL REGISTER the date of such closure, as well as any incidental harvest level(s) recommended by the Council and approved by NMFS.

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3. In § 660.511, add paragraph (k) to read as follows:

§ 660.511 Catch restrictions.

* * * * *

(k) The following ACLs apply to fishing for monitored stocks of CPS finfish:

(1) Northern Anchovy (Central Subpopulation): 23,573 mt.

(2) [Reserved]

[FR Doc. 2019-06790 Filed: 4/5/2019 8:45 am; Publication Date: 4/8/2019]